LL.B. '15. Both Mr. Hill and Mr. McLain are former editors of the REVIEW. The School also has the long-awaited pleasure, this year, of welcoming back Prof. J. I. Westengard, LL.B. '98, who has been on leave of absence as legal adviser to the King of Siam since 1903. He will give the courses on third-year Property, on Deeds, and on International Law.

COMPULSORY SALES UNDER THE CLAYTON ACT. — It has become a deep-rooted principle of the modern common law that only an exceptional class of business enterprises, grouped under the designation of common employments, are under any affirmative duty to serve the public on demand, without discrimination, and for a reasonable remuneration. There is undoubtedly a strong modern tendency, despite supposed constitutional restrictions, to permit the legislature to add new types of business to this class.[1] Indeed the historical validity of the whole distinction between "public service" companies and ordinary businesses has been disputed,[2] and it has been urged that in the extension of public-service obligations to "private" business lies the solution of modern trade problems.[3]

Whether, aside from the conception of public employment, there is not in the rich field of common-law precedent some other principle from which can be evolved an obligation, under certain circumstances, to serve the public equally, and a correlative right on the part of individuals to require such service, is the question presented in the first case to arise under the Clayton Act. *The Great Atlantic and Pacific Tea Co.* v. *Cream of Wheat Co.*, 224 Fed. 566. The defendant, the manufacturer of "Cream of Wheat," had induced jobbers to maintain prices at such a level that retailers could not profitably sell to the public below fourteen cents a package. The plaintiff, owner of a chain of stores, and a regular customer of the defendant, sold to the public at twelve cents. The manufacturer thereupon refused to sell him any more of the cereal. The plaintiff brought suit in the federal district court, praying that the price-maintenance scheme be declared in contravention of the anti-trust laws, and that the defendant be restrained from "cutting off the said plaintiff's supply" of "Cream of Wheat." Judge Hough refused to grant a preliminary injunction.[4]

Under federal authorities an attempt to fix prices among retailers is an unreasonable restraint of trade under the Sherman Law.[5] Under Section

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[1] German Alliance Ins. Co. *v.* Kansas, 233 U. S. 389; The Pipe Line Cases, 234 U. S. 548. For a discussion of the tendency which these cases illustrate, see 28 HARV. L. REV. 84.

[2] Adler, "Business Jurisprudence," 28 HARV. L. REV. 135.

[3] *Ibid.*, at pp. 160 *ff.*

[4] An appeal is pending in the Circuit Court of Appeals.

[5] That price-fixing is unreasonable restraint of trade has been decided by the federal courts in numerous decisions holding contracts unenforceable. Dr. Miles Medical Co. *v.* Park & Sons Co., 220 U. S. 373; Bauer & Cie *v.* O'Donnell, 229 U. S. 1; John D. Park & Sons Co. *v.* Hartman, 153 Fed. 24. A recent decree enjoining such practice at the suit of the United States is based on that principle. United States *v.* Kellogg Toasted Corn Flake Co., 222 Fed. 725 (decree filed Sept. 20, 1915). The California

16 of the Clayton Act, therefore, the plaintiff is entitled to a decree enjoining the illegal conduct if he can show that it threatens him irreparable injury.[6] This mode of relief, however, would bring the plaintiff no substantial benefit. A breakdown of the price-maintenance scheme among retailers will not secure to the plaintiff a supply of the coveted article. Indeed the plaintiff is not, on accurate analysis, injured by a violation of the Sherman Law, since it is not the illegal feature of the scheme — the price maintenance — but the failure to deal with the plaintiff, from which he is suffering.[7] It is, of course, possible to give the plaintiff what he wants by framing a decree in the alternative, directing the defendant to discontinue the illegal scheme or sell to the plaintiff. But there is nothing in any of the anti-trust laws to warrant such a decree, where the plaintiff is not himself suffering from positive illegal conduct. In the principal case the only relief which would help the plaintiff would be a decree compelling a sale at customary prices. But the defendant is not a public-service company, either at common law or by legislative fiat.[8]

There is, however, it is submitted, a common-law principle on which a statutory prohibition against discrimination among customers, involving, if need be, compulsory sales, can be predicated without raising any constitutional doubts even where the business is not a public service. It is a principle that is familiar in the law of torts. Let it be supposed

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and Washington courts distinguish the price-fixing of articles manufactured in competition with commodities identical except in quality and brand. Thus the vendors of a special brand of olive oil, sold as such, of "Ghirardelli's Ground Chocolate" and of "Fisher's Blend of Patent Flour" have been allowed to regulate prices. Grogan *v.* Chaffee, 105 Pac. 745; D. Ghirardelli Co. *v.* Hunsicker, 164 Cal. 355; Fisher Flouring Mills Co. *v.* Swanson, 137 Pac. 144. But as the line of reasoning of the federal cases seems to be that the legitimate benefit and protection to the manufacturer is more than counterbalanced by the evils attending the stifling of competition among jobbers and retailers, a distinction based solely on the competitive nature of the commodity does not seem sound, nor likely to be adopted by the federal courts. Further, though "Cream of Wheat" consists of a staple commodity known as "purified middlings," yet the defendant is marketing it as "Cream of Wheat," and the fact that the same article can be obtained under a technical or otherwise differing name does not distinguish but identifies the principal case with the main body of decisions.

But though an inflexible dogma condemning all price maintenance may satisfy the test of legal reasoning, it seems hardly adequate to meet the facts of business necessity. Price-fixing may under certain circumstances be reasonable. Although competition among retailers be desirable and opposition to economic means of distribution as such cannot be encouraged, yet a carefully nursed business dependent upon the maintenance of a uniformly fair selling price should be allowed to protect itself against the "piratical" attacks of an unfair price-cutter. Nevertheless, it would seem that price maintenance is at least *primâ facie* unreasonably in restraint of trade, and that only upon inquiry into the details of a business can this presumption of unreasonableness be rebutted. Upon application for preliminary injunction, therefore, as in the principal case, the practice of price-fixing should, it is submitted, be considered in restraint of trade.

[6] (1915) 1 FED. STATS., ANN. SUPP. 127.

[7] There was also an allegation that the defendant threatened to cut off the supply of jobbers who furnished the plaintiff with "Cream of Wheat." The court does not seem to have been convinced that this attempt showed sufficient prospect of success to injure the plaintiff seriously.

[8] Whether the manufacture of a breakfast food is a business sufficiently "affected with a public interest," within the rule of Munn *v.* Illinois, 94 U. S. 113, to enable Congress to impose on it the obligations of common employment is a question which existing federal decisions leave in doubt. See n. 1, *supra*.

that a manufacturer, solely to gratify a private spite against a certain retailer, sells his product, an article of general consumption, to all retail stores within competing distance at very low prices, but refuses to sell to the retailer whom he is trying to injure. Clearly the retailer should be given a right of action against the manufacturer, on the broad principle that intentional damage without justification is actionable.[9] To maintain an action on this theory, however, it is not necessary that the purpose be solely to injure the plaintiff; it is enough if it is one that the law does not countenance. Thus an injury inflicted intentionally by means of a strike called for the purpose of establishing a closed shop has been held actionable, the purpose of the strike being considered illegal.[10] On similar grounds injury by a manufacturer against a retailer by means of a discrimination whose purpose is illegal restraint of trade should be actionable. And since the injury arises out of the sales made to competitors, and since these sales are discriminatory only as long as the defendant refuses to sell to the plaintiff, an alternative decree directing the defendant to sell to all equally or to none would be entirely proper. In this way what is virtually a compulsory sale could be effected.

To enable the federal courts to issue such a decree there must, however, be legislative authority. The power to enjoin violation of the Sherman Law does not, as has been indicated, avail the plaintiff in the principal case. The Clayton Act makes it illegal to "discriminate in price," [11] a phrase which does not seem to cover a refusal to sell at any price. It would require, therefore, a statutory prohibition against all discrimination among consumers for the purpose of restraining trade, to justify the relief sought in the principal case.[12] With such a statutory prohibition, it is submitted, a compulsory sale would not be unconstitutional.

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[9] Thus where a wealthy banker, for the sole purpose of gratifying a private spite against a local barber, set up a rival barber shop and operated it at a loss with a view to driving the barber out of business, he was held liable in tort at the suit of the barber. Tuttle *v.* Buck, 107 Minn. 145, 119 N. W. 946. But see Passaic Print Works *v.* Ely & Walker Dry Goods Co., 105 Fed. 163.

[10] Plant *v.* Woods, 176 Mass. 492, 57 N. E. 1011; Fairbanks *v.* McDonald, 291 Mass. 287, 106 N. E. 1000. Criticism of these cases has not questioned the correctness of the principle that intentional injury is actionable unless justified, but has been on the ground that the social interest in trade unionism affords a justification. See 28 HARV. L. REV. 529.

[11] Sec. 2.

[12] Such legislation would seem most fruitful were it to consist of additional power granted to the Federal Trade Commission, enabling it to exercise regulative and judicial functions similar to those so profitably engaged in by the Interstate Commerce Commission. But more pressing than the need of regulation is the necessity of shifting from the shoulders of the legal expert the burden of shaping the business practice of the country through continuous interpretation of the common-law phrase, "unreasonable restraint of trade." The Clayton Act, which prohibits specific abuses only "where the effect . . . may be to substantially lessen competition" (Secs. 2, 3, and 7), leaves the courts facing the old problem. And the Trade Commission is empowered merely to assist, not to substitute, the courts.

However, it is not impossible that the courts may themselves shift this burden through an extension of the principle laid down in the Abilene case, that the Interstate Commerce Commission is the only body which can pass on such an administrative question as railroad rates. Texas & Pacific Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426. The United States Supreme Court has interpreted the Sherman Act, in *dictum*, as limiting individual redress to such cases where a determination of illegal-

THE EFFECT OF AN OVERRULING DECISION UPON ACTS DONE IN RELIANCE ON THE DECISION OVERRULED. — A recent Mississippi case raises a question which tests the soundness of an old and respected theory of the common law. The court there refused to give a change of its construction of a criminal statute a retroactive effect on the prior acts of the defendant, which the court had pronounced innocent at the time he committed them. *State* v. *Longino*, 67 So. 902.[1] The decision went partly on the ground that the conviction of the defendant under such circumstances would violate the constitutional prohibition of cruel and unusual punishments. But that reason seems clearly unsound;[2] and a broader ground, on which the court also relied, must be taken to justify the result.

According to the orthodox theory of Blackstone, which still claims at least the nominal allegiance of most courts, a judicial decision is merely evidence of the law, not law itself; and when a decision is overruled, it does not become bad law; it never was law, and the rule announced in the later case has been the law all the time.[3] But where in reliance on the earlier decision men have acquired contract or property rights which are valid under the law as then declared by the highest court of the state, or have done acts which according to that law are innocent, as in the principal case, the logical outcome of this doctrine would often cause great hardship and injustice. When confronted by this situation, however, the great majority of the courts have refused to go the whole length of the doctrine, but have made a so-called exception to it.[4]

The question has most often come up in cases involving contract rights. In a series of cases in which state courts had held statutes au-

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ity has been reached in a suit by the Attorney-General. D. R. Wilder Mfg. Co. *v.* Corn Products Refining Co., 236 U. S. 165; see 28 HARV. L. REV. 691. An analogous interpretation of the Clayton and Trade Commission Acts involves no further step. If individual redress with threefold damages, specifically provided for in the Sherman Law, is predicated upon the determination of illegality in a government suit, the relief granted by Section 16 of the Clayton Act can be interpreted as dependent upon the establishment of unlawful practices by the Trade Commission. This construction is aided by the consideration that the Clayton Act provides that facts established in Trade Commission suits shall be *primâ facie* evidence in private actions based thereon. It is an important distinction, however, that an individual may sue before the Interstate Commerce Commission, while he has no such standing before the Trade Commission. Legislation giving him such standing would clearly warrant an extension of the rule of the Abilene case to suits under the Clayton Act.

[1] This case is more completely stated in this issue of the REVIEW, p. 103.

[2] As was pointed out by Weaver, J., in State *v.* O'Neil, 147 Ia. 513, 535, 126 N. W. 454, 461, this prohibition is directed against excessive or unreasonable punishment after it is assumed that the defendant is guilty. In the principal case the statutory penalty was imprisonment for not more than five years, for receiving a bank deposit while having good cause to believe the bank insolvent. That can hardly be called an unreasonable punishment if it is assumed that the defendant is guilty of the crime, which is in fact the point at issue. For further discussion of this constitutional provision, see 24 HARV. L. REV. 54; COOLEY, CONSTITUTIONAL LIMITATIONS, 471; WATSON, CONSTITUTION, 1510.

[3] 1 BL. COM. 68–71. See Harbert *v.* Monongahela River R. Co., 50 W. Va. 253, 255, 40 S. E. 377, 378; Storrie *v.* Cortes, 90 Tex. 283, 291, 38 S. W. 154, 158.

[4] See Center School Township *v.* State, 150 Ind. 168, 173, 49 N. E. 961, 963, where the court said that though in general a change in judicial decision had a retrospective effect, the courts would not apply it so as to impair vested rights such as property rights or those resting on contracts. See also cases cited in note 9.